UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

---oOo---

FRANK E. EALEY, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	)	No. 21520

APPELLANT'S OPENING BRIEF

This is an Appeal from the Judgment and Conviction of the United States District Court for the Western District of Washington Northern Division

The Honorable William T. Beeks
Judge Presiding

O. W. GOAKEY

COLLEY AND McGHEE
1617 - 10th Street
Sacramento, California

Attorneys for Appellant

TOPICAL INDEX

TABLE OF AUTHORITIES

CASES

CODES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

---oOo---

FRANK E. EALEY,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 21520
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	
	)	

APPELLANT'S OPENING BRIEF

This is an Appeal from the Judgment and Conviction
of the United States District Court for the
Western District of Washington
Northern Division

The Honorable William T. Beeks
Judge Presiding

STATEMENT OF THE CASE

Defendant was charged in a six count indictment, two counts each of violation of 21 U. S. C. 174, 26 U. S. C. 4704(a) and 26 U. S. C. 4705(a), on or about July 27, 1966; was duly arraigned on or about August 17, 1966 and entered pleas of not guilty to each count. Trial by jury was set for September 6, 1966 and commenced on that date. A verdict of guilty was returned by the jury on each count of the indictment on September 6, 1966, and on October 28, 1966, judgment and sentence was pronounced and imposed on Counts I, II, V and VI. The Court set aside the verdicts of guilty on Counts III and IV of the indictment and dismissed said counts pursuant to defense counsel's motion made at the close of the Government's case (R. T. pp. 104-8) and on which ruling had been reserved. Defendant appealed from the judgment and sentence rendered.

STATEMENT OF FACTS

In a six count indictment defendant was charged as follows: (1) Two counts of violation of 21 U.S.C. 174, Count I charging that on or about December 16, 1965, at Seattle, Washington, defendant knowingly and unlawfully concealed and sold a quantity of narcotic drugs, heroin hydrochloride, knowing the same to have been imported into the United States contrary to law. An identical charge to Count I is made in Count II except that the alleged offense occurred on or about January 13, 1966. (2) Two counts of violation of 26 U.S.C. 4704(a), Count III charging that on or about December 16, 1965, at Seattle, Washington, defendant knowingly and unlawfully sold, dispursed and distributed, a quantity of heroin hydrochloride, a narcotic drug not in or from the original stamped package. An identical charge is made in Count IV except that the alleged offense occurred on or about January 13, 1966. (3) Two counts of violation of 26 U.S.C. 4705(a) Count V alleging that on or about December 16, 1965, at Seattle, Washington, defendant knowingly and unlawfully sold a quantity of heroin hydrochloride, a narcotic drug, not in pursuance to a written order of the person to whom such heroin hydrochloride was sold on a form issued in blank for that purpose by the Secretary of the Treasury or his delegatee. Count VI charges an identical offense except that it allegedly occurred on or about January 13, 1966.

At the trial the Government called one Joseph Vincent Ferro, a narcotic agent, who testified that his office investigated defendant in October, 1965, on the basis of information received

from the Bureau's Los Angeles office. R. T. 7. Joseph Gordon, a deputy sheriff, was engaged and used as an undercover agent to investigate defendant and on December 16, 1965, Gordon was given $500 of official advance funds (money used to purchase narcotics) R. T. 8, and told to go to the residence of an informant, Harvey Edwards, for the purpose of purchasing narcotics from defendant. The residence in question was placed under surveillance by Ferro and others assisting him. Defendant was later observed leaving the residence in question with Deputy Gordon and the latter had a container, containing a white substance later admitted into evidence as People's Exhibit 1. R. T. 13.

On January 13, 1966, Ferro testified that he gave Gordon $1,100 to purchase narcotics from defendant. R. T. 21. The narcotics allegedly purchased were admitted into evidence as People's Exhibit 2.

Ferro did not personally know defendant before the above mentioned incidents.

Agent Ferro testified, over objection, that the narcotics allegedly purchased on December 16, 1965 did not bear a tax stamp.. R. T. 14. He further testified that he does not issue order blanks of the Secretary of Treasury for purchase of narcotics; he is not assigned to that department nor is it one of his duties. R. T. 18-20. He also testified that the container wherein the narcotics allegedly purchased on January 13, 1966 had no tax paid stamp affixed to it. R. T. 25. He is not familiar with the type of stamp placed on "these packages." R. T. 27. The jury was then admonished to disregard all of the testimony that no tax stamp appeared on the Government's

Exhibits 1 and 2.

Joseph Gordon, deputy sheriff, King County, was loaned to Federal Bureau of Narcotics, testified that he first met defendant at 3646 Courtland Place South where a person by the name of "Harv" resided. He was not in uniform nor did he reveal who he was to defendant at this meeting or any other. R. T. 31-32. On December 16, 1965, he purchased narcotics from defendant.

Gordon testified that on January 6, 1966, he placed a person to person call to defendant in Sacramento, California. R. T. 42, with Ferro and Agents McClain and Abbey listening on extension phones. He did not, however, recognize defendant's voice. After a voice came on the phone, Gordon stated "Hello Frank" and after conversation by the party on the other end, he stated "I need three and at least two." Use of such jargon means ounces of heroin. R. T. 45. No other testimony was given regarding this telephone conversation.

On January 13, 1966, the Bureau gave Gordon $1,100 of advance government funds with which to purchase narcotics. Gordon is not registered with anyone to purchase narcotics except in his official position. Nor did he have any authority from Secretary of the Treasury either time the alleged purchases took place. R. T. 57. On this particular day a sale of heroin was consummated with defendant by Gordon.

Aubrey Abbey, Agent Federal Bureau of Investigation, corroborated the testimony of Ferro and Gordon. R. T. 74-93. William J. Gowans, chemist employed by the United States Treasury Department testified that the powdered substance in Exhibits 1 and 2, in his opinion

after conducting certain tests, was that the substance was heroin hydrochloride.

After the Government rested defendant moved the Court out of the presence of the jury for a directed verdict of acquittal. R. T. 104. The Court denied all motions for mistrial and denied the motion for judgment of acquittal on Counts I, II, V and VI of the indictment. The Court reserved ruling on Counts III and IV until after the jury's verdict was returned finding defendant guilty on each count as charged.

ARGUMENT

I. WHETHER THE COUNT COMMITTED PREJUDICIAL ERROR BY RESERVING ITS RULING ON COUNTS III AND IV OF THE INDICTMENT, SUBMITTING THE SAME TO THE JURY ALONG WITH OTHER COUNTS IN THE INDICTMENT.

It should be made clear at the outset that no challenge here is intimated or remotely suggested or intended regarding the court's setting aside the guilty verdicts of Counts III and IV of the indictment and acquitting defendant on these counts. What is challenged here is the procedure the trial court followed in doing so. It is defendant's contention, then, that it was prejudicial error for the court to first submit the two counts to the jury after a motion was timely and duly made to direct acquittal or dismiss and rule on the motion after verdicts of guilty had been reached.

Following such a course in the factual circumstances of this case, we believe, manifestly resulted in reversible error. It should be kept in mind that all six alleged offenses occurred on two different dates. In fact the two quantities of alleged contraband drug were the basis for the three different charges on the two different occasions. Hence, in the minds of a lay jury a finding of one violation would automatically require a finding of guilt on all charges based on the same alleged incidents. Much like the situation in Chichos vs. Divideria, 87 S. Ct. 271 (1966) by parading six counts

of alleged illegal conduct before the jury, such a procedure "gave the prosecution an advantage of offering the jury a choice -- a situation apt to induce a doubtful jury to find the defendant guilty xxx." U. S. ex rel Hetenyi vs. Wilkens, 384 F. 2d 844, C.A. 2d (1965), cert den. Mancusi vs. Hetenyi, 383 U.S. 913.

Rule 29, FRCP, provides:

> (a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.
>
> (b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the Court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the Court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the Court may order a new trial or enter judgment of acquittal.

Rule 29 is worded in the context of a motion of acquittal being made to the entire charge or indictment. It is not framed in such a way as to challenge, in part, selected counts. Hence, in such cases, by lumping those charges upon which evidence has been admitted but which as a matter of law is not sifficient to sustain conviction, a defendant is placed in the unwary predicament of having

a doubtful jury convict him on a wholesale basis of all of the charges submitted to it. And that is exactly what occurred here. See Federal Practice and Procedure, Sections 2221-2225.

To be sure there was not one single scintilla of evidence presented that defendant knowingly sold or dispersed a quantity of narcotics "not in or from the original package." The corpus delecti of the offenses charged in Counts III and IV was not established and as a matter of law and no offenses shown. See Epstein vs. U. S. 174 F. 2d 754, 6th Cir. (1949). Defendant, being his only witness, denied all allegations of all counts. He had no burden to meet as to any issue or element of the offenses charged in Counts III and IV. Thus, the record remained as it was at the close of the Government's case regarding these charges. It, therefore, was incumbent upon the trial judge to grant the motion before submitting the case to the jury. Having failed to do so and in the circumstances of each of the four remaining charges on which convictions were rendered, after the close of the case and discharge of the jury, defendant should have been granted a new trial in order to avoid the prejudicial effect of having two charges legally deficient considered along with other charges.

II. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUBMIT COUNTS V AND VI TO THE JURY AND A MOTION OF ACQUITTAL ON THESE COUNTS SHOULD HAVE BEEN GRANTED.

One reading the indictment in this case must conclude

that the Government either over zealously fractionalized its case into legally defective counts in order to achieve a desired result or over estimated the evidence it had to establish a case. The record is devoid of any evidence tending to establish directly, circumstantially or by inference that on either December 16, 1965 or January 13, 1966, defendant knowingly or unlawfully sold a quantity of heroin hydrochloride "not in pursuance of a written order of the person to whom such heroin hydrochloride was sold on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate."

Agent Ferro and Deputy Gordon testified at length regarding the use of advance funds with which to purchase evidence but such testimony, it is submitted, does not raise the inference that the requisite form was not obtained also or represented to defendant to have been obtained. Source of the funds used to purchase contraband is no element of the offense but the absence or presence of the requisite form is indeed. While it is true on Deputy Gordon testified, in the context of the question raised that he did not "have any sort of written form from the Secretary of the Treasury, the type of form which authorizes the purchase of narcotics xxx" at the time of an alleged purchase (R. T. pp. 56-58) such questions and answers do not settle the matter because the statute specifically provides that a delegate of the secretary may issue the requisite form. In addition, from the Government's entire case, we had at least three other persons assisting in the events: Ferro, Abbey and McClain. There is no testimony that neither of those persons had no form or that Gordon was not acting, at the time of the alleged purchases, for each or any of them.

In addition, as the record shows, Ferro was unfamiliar with the forms required and there was no showing that Gordon knew any more about what was required or had in fact been obtained. In the circumstances, it is submitted these counts should not have been submitted to the jury on such shallow evidence and absence of proof of an element of the charged offenses.

This factor together with the court's submission of Counts III and IV to the jury resulted in a prejudicial error to defendant.

III. DEFENDANT'S ACQUITTAL OF COUNTS III AND IV FORECLOSED CONVICTION ON COUNTS I AND II UNDER THE FACTS OF THIS CASE.

21 U.S.C. Section 174 and 26 U.S.C. 4704(a) contain what Chief Judge Bazelon has termed "statutory overlap." See concurring opinion, Hutcherson vs. U.S., 345 F. 2d 964, D. C. Cir. (1965). A reading of both sections indicate that 26 U.S.C. 4704(a) is more specific in its reach than 21 U.S.C. 174. Thus where a defendant is acquitted of charges of knowingly selling contraband not from its original package or without the appropriate stamps affixed, a Section 174 charge under Title 21, based on the same conduct must necessarily fall. This is so because narcotics possessed in the original package properly stamped would raise no presumption of illegal entry or importation into the United States and would not place upon a defendant any necessity to explain his possession. Thus, where a prosecutor has elected as he might to charge a defendant with counts of violation of both 21 U.S.C. 174 and 26 U.S.C. 4704(a) based on

the same conduct acquittal on the latter charge necessarily compels acquittal on the former.

We raise no questions here that the United States Attorney could not bring the charges as he did. What is contended here is that, having elected to prosecute in this way, he is bound by the result which obtains. It defies logic to say on the one hand a defendant is legally innocent of the charge and, using the same conduct, in the same court and case, convict him on another charge covering the same essential elements.

IV. IT WAS ERROR FOR THE TRIAL COURT TO DENY DEFENDANT'S MOTIONS FOR MISTRIAL UNDER THE FACTS OF THIS CASE.

The transcript is replete with misstatements, conclusions and characterizations by witnesses for the Government regarding defendant's activities. See for example, R. T. p. 35. Consequently defendant was held out as being a heavy trafficker in contraband and thus the jury was prone to convict on any charges made by the United States Attorney and, in fact, did. Certainly loose characterizations or misleading references in a case such as this could not but result in prejudice to defendant, and by reason thereof, defendant should be granted a new trial.

CONCLUSION

For the reason set out above the judgment of the court should be reversed.

Respectfully submitted,

O. W. GOAKEY

COLLEY AND McGHEE

By: Milton L. McGhee
Attorneys for Appellant